

CITY COUNCIL STAFF REPORT MEETING DATE: July 7, 2004

TITLE: PRESENTATION OF COUNCIL SUBCOMMITTEE REPORT ON THE RESULTS OF THE INVESTIGATION INTO THE SURVEILLANCE OF THE CITY MANAGER RECOMMENDED ACTIONS:

- 1. Accept the subcommittee's report on the results of their investigation through July 2, 2004.
- 2. Consider adoption of appropriate recommendations.
- 3. Schedule Special City Council Meeting for July 14, 2004 to take action on recommendations
- 4. Continue investigation if directed by Council.

Agenda Item # 1

PREPARED AND SUBMITTED BY:

Mayor Pro Tem Greg Sellers

and

Councilmember Larry Carr

EXECUTIVE SUMMARY: During the first week of February 2004, City Manager J. Edward Tewes learned that he was put under surveillance while traveling on City business. On February 18, 2004, the City Council of the City of Morgan Hill appointed a subcommittee consisting of Mayor Pro Tem Greg Sellers and Councilmember Larry Carr to investigate that incident.

After months of investigation the subcommittee has now submitted its report on the findings of the investigation, along with recommendations for Council actions on the matter.

The recommendations are consistent with the City of Morgan Hill and its Council's commitment to maintaining the highest expectations for the transparent, fair, and ethical conduct of itself and of its citizens in their dealings with City government and its commitment to preserving a safe working environment for its employees.

FISCAL IMPACT:

No budget adjustment required.



17555 Peak Avenue Morgan Hill, CA 95037-4128

<u>Subcommittee's Report on the Investigation, as of July 2, 2004, of Surveillance of City Manager J. Edward Tewes</u>

Submitted by: Mayor Pro Tem Greg Sellers and Councilmember Larry Carr

I. Introduction.

During the first week of February 2004, City Manager J. Edward Tewes was put under surveillance while traveling on City business. On February 18, 2004, the City Council of the City of Morgan Hill appointed a subcommittee consisting of Mayor Pro Tem Greg Sellers and Councilmember Larry Carr to investigate that incident. Part II of this report summarizes the information learned from the investigation; Part III presents Conclusions, Recommendations, and possible options for action by the City Council.

This report is based on the following sources:

- Interview with J. Edward Tewes.
- Interviews with private investigator Kelly Jones.
- Interviews with City Attorney Helen Leichter.
- Conversations with Councilmember Hedy Chang.
- Conversations with Bruce Tichinin.
- Email and documents that are public records.

II. Information.

As indicated in this report of the subcommittee's investigation, which has been in progress for more than four months, the subcommittee wishes to bring to the attention of the City Council the following information and issues concerning actions taken by Bruce Tichinin and Councilmember Hedy Chang.

A. Background.

Bruce Tichinin is a resident of Morgan Hill and an attorney who regularly represents clients who have matters pending before a city agency or the City Council. In early February 2003, Mr. Tichinin was appointed by the City Council to serve on the Morgan Hill Urban Limit Line Study Committee. At that time, he also represented Councilmember Hedy Chang concerning claims of defamation and harassment made against her by City Attorney Helene Leichter. Those claims arose out of statements made by Ms. Chang to others that Ms. Leichter and Mr. Tewes were engaged in an adulterous sexual relationship. Dan Siegel and Bill McClure of the law firm of Jorgenson, Siegel, McClure & Flegel, LLP represented the City with regard to the City Attorney's allegations.

On, Tuesday, February 3, 2004, Mr. Tewes and Ms. Leichter attended a lunch meeting with Mr. Tichinin and his client, who is also his financial partner, Mr. Howard Vierra (who was accompanied by his wife), to discuss their request for reconsideration of an adverse ruling by the Council that their proposed project was inconsistent with the City's General Plan. During that meeting, Mr. Vierra expressed his disappointment that the City Manager was "not on his side," and asked Mr. Tewes, "what would it take to get you on my side?" Mr. Tichinin told Mr. Tewes and Ms. Leichter that they risked a lawsuit seeking personal damages from them, citing 42 U.S. Sec. 1983. Mr. Tichinin told Mr. Tewes and Ms. Leichter that he thought each had a personal interest in the outcome of the general plan matter that was motivated by personal animus related to "that other matter." Councilmember Chang has used this same terminology when referring to her allegations that Mr. Tewes and Ms. Leichter were engaged in a sexual relationship and to Ms. Leichter's resulting claims of defamation and harassment. Both Mr. Tewes and Ms. Leichter stated their belief that Bruce Tichinin was referring to the same matter. During the lunch, Mr. Tewes also told Mr. Tichinin and the Vierras that he would not be present at the February 4, 2004 Council meeting because he would be traveling on city business.

Later that afternoon, February 3, Ms. Chang telephoned Mr. Tewes while he was traveling to the airport to depart for a League of California Cities' conference in Huntington Beach. Ms. Chang inquired about the lunch meeting and urged Mr. Tewes "not to be angry" at Mr. Tichinin, since she had discharged him as her attorney and he was no longer representing her. It is not known how Ms. Chang knew about the meeting but, given her representation by Mr. Tichinin, he may have told her about it. Mr. Tewes also did not know why Ms. Chang felt it necessary to tell him that she had discharged Mr. Tichinin. However, it appears that Ms. Chang was making an effort to distance herself from Mr. Tichinin and make sure that Mr. Tewes knew it.

On more than one occasion, Ms. Chang asked city staff about Mr. Tewes's travel plans for that week, and was thus aware of his flight number, schedule and hotel reservation. Following these inquiries, however, Ms. Chang did not contact him while he was in Huntington Beach.

B. Events at the Huntington Beach Conference.

Mr. Tewes departed for the Hyatt Regency Huntington Beach on the afternoon of February 3, 2004.

On Thursday, February 5, 2004, when he returned from seminars he had attended that day, he found a room service order of hot chocolate for two in his room. He had not placed the order and thus called hotel staff to request its removal.

On February 6, 2004, Mr. Tewes was approached by a League of California Cities staff member asking if he had received the staffer's phone message from the night before. Mr. Tewes replied he had not. The League staffer then informed Mr. Tewes that Hyatt staff had changed a man's room assignment to allow that man to ocupy a room across from Mr. Tewes's. The man had initially explained that he needed to be closer to Mr. Tewes because they were coworkers. However, the bellboy who assisted the man in making the room change reported that the man identified himself as a private investigator and explained that he needed to be close to Mr. Tewes to "keep an eye on him." The bellboy reported the incident to the Bell Captain, who in turn alerted the hotel Security Director. The incident was recorded in an email that League staff presented to Mr. Tewes. Mr. Tewes found the information very alarming.

While packing his belongings to check out of the hotel on Friday, February 6, Mr. Tewes received a phone call from an unidentified man asking to speak with "Jason." Mr. Tewes asked for Jason's last name. The caller replied, "Adams, isn't this room number _____?" Mr. Tewes told him it was not and the caller hung up. Mr. Tewes then called the front desk to ask for a Jason Adams and was informed that nobody by that name was registered at the Hyatt.

Upon his departure, Mr. Tewes left his room loudly and, anticipating he would be followed, waited in a hallway alcove to determine if that would, in fact, happen. Shortly after leaving his room, he observed a man with a video camera walk past him. It appeared that the camera was turned on and that the man was filming down the hallway. Upon seeing Mr. Tewes in the alcove, the man immediately diverted his camera. Mr. Tewes followed the man down the stairs to the lobby, where Mr. Tewes checked out. While waiting for the valet to bring his car, Mr. Tewes noticed the man with the camera waiting in the same area, but did not see him request a vehicle or any services from the valet.

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^a The caller gave a specific room number. Mr. Tewes could not recall the number given, but knew that it was not his own.

Mr. Tewes described the man approximately 6'1" in height, of a somewhat "beefy" build, and perhaps mid to late 20s. He was dressed in baggy jeans, a sweatshirt or jacket, and a backwards baseball cap reading "skateboarding is not a crime." He wore dark sunglasses and carried a reddish canvas bag.

Upon returning from Huntington Beach, Mr. Tewes carefully considered whether any of his actions, personally and professionally, could have prompted someone to place him under surveillance. There was nothing in his personal life, no marital problems, and no similar familial or social concerns, that he could see as cause for the Huntington Beach events. He considered whether he or his office were involved in a workers' compensation claim or other potentially controversial action. He could think of none. Mr. Tewes concluded that the surveillance must have been related to his professional life, but for reasons that he could not determine. After consulting informally with the City Attorney, an Assistant District Attorney for Santa Clara County, and Councilmembers, he reported the incident to special counsel to the city, Dan Siegel and Bill McClure. He said that he feared for himself and his family and that he felt the surveillance was been related to his job because he could think of no other activities that would have prompted it

C. Results of Investigation.

On February 20, 2004, at the direction of the subcommittee, the City Attorney retained private investigator Kelly Jones to investigate the surveillance of Mr. Tewes. Mr. Jones's investigation determined that Brian Carey, a Santa Cruz resident who is not a licensed private investigator, was the man who followed Mr. Tewes. Mr. Jones did not learn who hired Mr. Carey. In March 2004, Mr. Tewes was shown a videotape of Brian Carey. He identified Mr. Carey as the man he had seen with the video camera in Huntington Beach in February 2004. (Exhibit A, attached hereto.)

Mr. Jones reported to the subcommittee that he traveled to Huntington Beach to interview Hyatt staff soon after his retention. During interviews, he learned that the Hotel protocol required that a room service order be placed only from the room to which it is to be delivered. This led Mr. Jones to believe that Mr. Carey had trespassed into Mr. Tewes's room to order the hot chocolate. Mr. Jones believes that while the housekeeping staff was making up Mr. Tewes's room, Mr. Carey could have entered and placed the order. The hotel told Mr. Jones that it does not maintain the room service order logs and so was unable to confirm the origin of the phone call and the order.

Mr. Jones was authorized by the subcommittee to attempt to meet with Mr. Carey and he reported that he met with Mr. Carey several times.^c Mr. Carey described himself as a

b This, apparently, is a common surveillance technique, according to Jones, as is calling the room and asking for a fictitious person.

^c It is noteworthy that upon their first meeting, Mr. Carey told Mr. Jones he was "expecting" him, and revealed that he was familiar with Mr. Jones's appearance and that he knew Mr. Jones's vehicle from statements made by his "boss." It seems likely that Mr. Carey obtained the description and personal information about Mr. Jones from someone on the Morgan Hill city staff or Morgan Hill police department staff, because Mr. Jones received his initial instructions for this investigation at a meeting held at the police station. In any event, Mr. Carey appeared to have information about Mr. Jones that was probably obtained by running a search of his license plates with a state agency.

"slammer" (i.e., someone who beats up people for fun) and as a skateboard punk involved in the "dharma punk" movement.

D. Bruce Tichinin's Involvement in the Surveillance.

On or about April 30, Ms. Leichter, on her own initiative, called Ms. Chang to request that she waive her attorney-client privilege with Mr. Tichinin so that Ms. Leichter could ask Mr. Tichinin if he was involved in hiring Mr. Carey. Ms. Chang said that she wanted to consult legal counsel. Ms. Leichter then called Mr. Tichinin and asked him if he had anything to do with the surveillance of Mr. Tewes. Mr. Tichinin denied hiring, or causing to be hired, an investigator on behalf of Ms. Chang.

On May 8, after learning about Ms. Leichter's communication with Mr. Tichinin, Mr. Sellers went to Mr. Tichinin's office to ask him if he had any involvement with the surveillance. Mr. Tichinin denied that he was involved. Mr. Tichinin also indicated he did not think Mr. Tewes adequately executed his duties as City Manager and, therefore, the City should not renew his contract.

On May 9, Mr. Sellers and Mr. Carr each received a phone call from Ms. Chang. She questioned both Mr. Carr and Mr. Sellers about the calls Ms. Leichter had made to herself and Mr. Tichinin. Ms. Chang asked each if he was present when Ms. Leichter made the calls. Both responded that they were not present for those calls. To each Councilmember, Ms. Chang denied having anything to do with, or knowing anything about, the surveillance.

On Monday May 10, Mr. Tichinin faxed and mailed a letter to Ms. Leichter to formally answer her question about whether he "had hired a private investigator to conduct surveillance of J. Edward Tewes[.]" The letter stated that Mr. Tichinin "did not hire a private investigator to conduct surveillance of Mr. Tewes *on behalf of Ms. Chang.*" (Exhibit B, attached hereto, italics added.) He also denied that he "ever discuss[ed] with Ms. Chang whether to hire an investigator to conduct any such surveillance on her behalf." (*Ibid.*)

On or about May 13, Councilmembers Chang and Sellers and Mayor Kennedy traveled to Sacramento for a League of California Cities' legislative conference. During the course of the conference, Ms. Chang urged Mr. Sellers several times to talk to Mr. Tichinin about the investigation, but did not explain why.

On May 14, at approximately 10:00 a.m., Mr. Sellers met with Mr. Tichinin. During the meeting, Mr. Tichinin admitted that he had, in fact, arranged for the surveillance of Mr. Tewes. He apologized for having lied to Mr. Sellers. He denied that the surveillance was at Ms. Chang's request, asserting that it was done on behalf of another client. He told Mr. Sellers that Mr. Tewes should "let go" of his concern over the surveillance, that he should get over it and move on.

On Monday, May 17, Mr. Sellers again met with Mr. Tichinin to obtain additional information about Mr. Tichinin's actions. Mr. Tichinin said he did not see that the City had

any legal recourse against him. He argued that no crime was committed and nothing illegal had been done. Mr. Tichinin contended that there was no cause for pursuing legal action.

When Mr. Sellers inquired as to the reasons for the surveillance, Mr. Tichinin stated that he felt the City Council had made up its mind that there was no sexual relationship between Mr. Tewes and Ms. Leichter, and no reason to believe there was any improper influence on their judgment or advice to the City Council on matters of interest to Mr. Tichinin's clients. Therefore, Mr. Tichinin explained, his only recourse was to "offer proof" by placing Mr. Tewes under surveillance in hopes of catching him with Ms. Leichter in Huntington Beach. That discovery could then be used to undermine the City Attorney. During the conversation, Mr. Tichinin continued to express his confidence that Mr. Tewes and Ms. Leichter were engaged in a sexual relationship. When asked, he could provide no evidence to support the assertion, but he did question what he viewed as suspiciously planned concurrent trips to the Yosemite area by Mr. Tewes and Ms. Leichter during the summer of 2003.

E. <u>Councilmember Chang's Knowledge of Mr. Tichinin's Involvement in the Surveillance.</u>

On the afternoon of May 14, 2004, the same day on which Sellers met with Tichinin, Ms. Chang met with Mr. Tewes and a constituent at her office to discuss an unrelated matter. Following the meeting, Ms. Chang abruptly asked Mr. Tewes if he knew whether Mr. Sellers and Mr. Tichinin had met that day. At that point, Mr. Tewes did not know of the Tichinin-Sellers meeting or the newly discovered information.

After the meeting with Ms. Chang, Mr. Tewes returned to City Hall and met with Mr. Sellers and Mr. Carr. Mr. Sellers told him what he had learned about Mr. Tichinin's involvement in the surveillance. Mr. Tewes was initially angry at the news, but then said that his two questions about the surveillance--who had followed him and why--had been answered. Mr. Sellers and Mr. Carr also called Ms. Leichter to let her know about the information. She was also upset, particularly because Mr. Tichinin's intent was to impugn her professional integrity.

On Monday, May 17, Ms. Chang called Mr. Carr at his office to discuss Mr. Tichinin's involvement in the surveillance. Ms. Chang said that Mr. Tichinin was her attorney at the time of the surveillance so she felt that she could not say anything about it. (This contradicts her statements to Mr. Tewes on February 3 that she had previously discharged Mr. Tichinin.) Ms. Chang said she could not tell Mr. Carr about Mr. Tichinin's role in the surveillance during their phone conversation the previous week because she "didn't know what he [Mr. Tichinin] was going to do." Ms. Chang told Mr. Carr that "he

^d At that time, both Mr. Tewes and Ms. Leichter were scheduled to be in the Yosemite area for separate purposes with different groups of people. In fact, Mr. Tewes did not take the trip. Ms. Leichter did, but she was always in the company of her family, including her husband. Hence, Mr. Tichinin's reference to the Yosemite trips does not appear to substantiate his suspicions. Neither Mr. Tichinin nor Ms. Chang has provided any credible evidence that Mr. Tewes and Ms. Leichter were having an affair, much less that their work had been improperly influenced. The subcommittee is unaware of any such evidence.

was my attorney, I told him not to do it, but he did it anyway." In subsequent conversations, Ms. Chang provided similar explanations to Mr. Sellers.

These events have caused the city to incur substantial investigative and other related costs.

F. Additional Observations.

Several portions of the foregoing narrative, considered together, would provide support for an inference that Ms. Chang assisted Mr. Tichinin in implementing his plan to put Mr. Tewes under surveillance and that she acted in tandem with him to conceal from the City Council the fact that he had ordered it. Those portions of the narrative and their relationship are discussed below.

- (a) Ms. Chang had prior knowledge of Mr. Tichinin's intention to put Mr. Tewes under surveillance.
- (b) Prior to the surveillance, Mr. Tichinin knew from the February 3 lunch meeting that Mr. Tewes would be out of town on business and would not attend the February 4 City Council meeting. It is also of note that the City Attorney's work schedule, circulated *only* to Councilmembers, indicated that she planned to be absent from work on February 6. On February 3, Ms. Chang made an effort to obtain detailed information about the itinerary for Mr. Tewes' trip to Huntington Beach, but did not use that information to contact him during that trip.
- (c) Such information was needed in order to put Mr. Tewes under surveillance in Huntington Beach, but was not publicly available.
- (d) Ms. Chang appears to have talked with Mr. Tichinin on the afternoon of February 3, shortly after Mr. Tewes' departure for Huntington Beach.
- (e) After the surveillance occurred, Ms. Chang repeatedly and falsely denied knowing anything about it.
- (f) She attempted to explain those falsehoods on the basis that Mr. Tichinin was her lawyer at the time of the surveillance. However, she told Mr. Tewes that Mr. Tichinin was *not* her lawyer at that time. Moreover, even if Mr. Tichinin had been her lawyer at that time, it is not apparent why that would have given her a motive to lie on his behalf. One possible explanation could be that he had ordered the surveillance as *her* attorney.
- (g) She also attempted to explain those falsehoods by saying that she didn't know what Mr. Tichinin was going to do. It is not apparent why that would have given her a motive to lie on his behalf. One possible explanation could be that she and Mr. Tichinin had an agreement to act in tandem.

(h) Both before and after the surveillance, Ms. Chang does appear to have been acting in tandem with Mr. Tichinin. The foregoing narrative of events concerning the surveillance indicates that both before and after the surveillance she initiated contacts with City personnel that were not only about Mr. Tichinin, but appear to have been prompted by prior conversations with him. Those communications include: her telephone call to Mr. Tewes on February 3; her telephone calls to Mr. Sellers and Mr. Carr on May 9; her discussions with Mr. Sellers on May 13; her meeting with Mr. Tewes on May 14; and her telephone call with Mr. Carr on May 17; and her subsequent conversations with Mr. Sellers.

III. Preliminary Conclusions, Recommendations and Further Action.

- 1. Based on the foregoing information, there is reason for the City Council to believe that:
- (a) In February 2004 Mr. Tewes was placed under surveillance at the Hyatt Hotel in Huntington Beach, California. Mr. Tichinin ordered that surveillance.
- (b) The surveillance was particularly frightening and intrusive. It included not just watching Mr. Tewes's actions, but also deception: lies told to hotel clerks, a fraudulent room service order, and a fraudulent telephone call to him.
- (c) Mr. Tichinin gave misleading information to City Attorney Leichter about his involvement in the surveillance.
- (d) Thereafter, Mr. Tichinin was aware that the City Council sought to learn who had ordered the surveillance, but lied to the Council when he intentionally concealed his involvement in the surveillance. His efforts to conceal his involvement included a conversation with Mr. Sellers, on or about May 8, 2004, during which Mr. Tichinin falsely denied having any involvement in the surveillance.
- (e) Mr. Tichinin discussed the surveillance with Ms. Chang both before and after it occurred. Ms. Chang assisted Mr. Tichinin with the surveillance by providing him with information used in conducting it.
- (f) Once Mr. Tewes reported the surveillance to the City Council, Ms. Chang was aware that the City Council sought to learn who had ordered the surveillance and why. Ms. Chang knew the answers to both questions, but intentionally concealed them from the other Members of the City Council. Her efforts at concealment included falsely denying to Mr. Carr and Mr. Sellers, in separate telephone calls taking place on or about May 9, 2004, that she knew anything about the surveillance.
- (g) Ms. Chang's failure to promptly disclose to the City Council what she knew about the surveillance caused the City to incur an unnecessary investigative expense.

- 2. This report will be presented to the City Council at its next regularly scheduled meeting on July 7, 2004. Mr. Tichinin and Ms. Chang will be provided with an opportunity to respond to it.
- 3. We recommend that, after receiving and considering whatever response Mr. Tichinin and Ms. Chang may provide, the City Council should promptly decide what action, if any, to take in this matter.

4. Possible actions include

- (a) Public condemnation of Bruce Tichinin;
- (b) Removal of Bruce Tichinin from the Morgan Hill Urban Limit Line Study committee;
 - (c) Censure of Ms. Hedy Chang;
- (d) Referral to the District Attorney of the issue of whether Ms. Chang should be removed from office;
- (e) Referral to the District Attorney of the surveillance matter for possible legal action;
- (f) Referral to the State Bar of California of Mr. Tichinin's conduct for possible disciplinary action;
- (g) Legal action against Ms. Chang to recover sums expended by the City relative to the investigation of the surveillance that were unnecessarily incurred because she knew about the surveillance and who ordered it, but failed to disclose this to the subcommittee before it incurred the investigation expenses;
- (h) Further investigation into the means by which Mr. Carey obtained identifying details concerning the city's private investigator; and
 - (i) Accept the report and take no further action.